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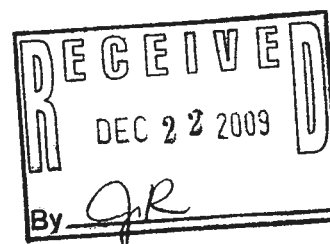
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December 22, 2009

VIA E-MAIL krispeterson@utah.gov and HAND DELIVERY

Utah Department of Transportation
Attn: Kris Peterson, Director of Construction & Materials
4501 South 2700 West, Box 148220
Salt Lake City, UT 84119



**Re: Notice of Protest Regarding Award
I-15 Corridor Expansion
Project No. MP-115-6(178)245**

Dear Mr. Peterson:

INTRODUCTION

Flatiron/Skanska/Zachry, a Joint Venture ("FSZ") respectfully files this Notice of Protest concerning the apparent award by the Utah Department of Transportation ("UDOT") of the above-referenced project to Provo River Constructors ("PRC"). This protest is made in accordance with: (1) the provisions of Article 8 Protest Procedures in the Instructions to Proposers ("ITP"); (2) the provisions of Articles 6.6 and 7.6 of the ITP; and (3) Utah Code 63G-6-801, et seq.

In compliance with the requirements of Sections 8.1 and 8.5 of the ITP and Utah Code 63G-6-801(1), this protest is brought within five working days of the date FSZ knew or should have known the facts and circumstances which are the basis of this protest.

GROUND FOR PROTEST

UDOT did not weight the evaluation factors consistent with the request for proposal ("RFP"). By failing to evaluate the proposals consistent with the criteria in the RFP, UDOT's apparent award was arbitrary and requires re-evaluation. In addition, UDOT's evaluation violated the requirements of Utah Code 63G-6-502(7)(b), (c).

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PROTEST SUMMARY

Representatives of FSZ preliminarily met with UDOT on Tuesday, December 15, 2009. FSZ was given limited information pertaining to its own proposal scores. A second meeting was held on Friday, December 18, 2009 to discuss the scoring of the FSZ proposal, the factors which resulted in the apparent award to PRC, and the nature and basis of a protest of any award to PRC. At that meeting UDOT provided a few details regarding the FSZ proposal and only provided nine of the scores from the PRC proposal. UDOT refused to provide further details based upon its position that such information are still confidential under the ITP terms in as much as a contract had not been signed and the stipend not accepted by the unsuccessful bid teams.

Because UDOT refused to give FSZ complete details of the scoring of the PRC proposal, this protest will be limited in its scope. Nevertheless, based on the executive summary provided by UDOT and the information gathered in the December 15 and December 18 meetings, FSZ contends that there are facts and circumstances which support a protest. FSZ reserves the right to supplement this protest after its representatives have had an opportunity to review additional information concerning the basis for the evaluation of scores upon which the apparent award may be made and any other matters pertaining to the ITP - Protest Regarding Award, Section 8.5.

FSZ contends that UDOT's scoring criteria as applied does not properly evaluate the difference in the value in the scope of the FSZ proposal as required under the criteria set out in Section 1.1.1, Section 4.5.1 and Section 4.5.1.2.3 of the ITP. Specifically, and as outlined below in this letter, FSZ's scope of work provides the public with a much greater value than the 0.4 of a point difference from the scope presented in the PRC proposal. FSZ requests UDOT to re-evaluate the FSZ proposal and give the appropriate consideration to the real difference in value as between the FSZ scope and the PRC scope.

The proper criteria that FSZ believes that UDOT should apply is set out in the following sections of the ITP:

- **Section 1.1.1 states:**
 - The Department has established a list of goals for the Project. The goals are as follows:
 - Deliver I-15 CORE within the budget
 - **Provide the highest value for the budget**
 - Minimize inconvenience to the public
 - Complete I-15 CORE by 2014
 - **Uphold the public trust**

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- **Section 1.1.1:** The Department {UDOT} has elected to procure a design-build team to design and construct **the best value project possible....** This will be accomplished through a **fixed-price, best design procurement approach....**
- **Section 4.5.1:** ... the Department {UDOT} **values creative, innovative solutions** that address mainline congestion, ramp queuing and aging infrastructure within the corridor.
- **Section 4.5.1.2.3:** The Proposal will be evaluated to determine its ability to **meet or exceed the Project goals, values and requirements.**

The second bullet in the Statement for the Project Goals and Values relates to: *"Providing the highest value for the budget"*. FSZ can demonstrate where their approach to the project brings an additional \$50-\$90 million of permanent capital improvements to the I-15 CORE project and surrounding communities. This additional scope was all accomplished while delivering the I-15 CORE within the Departments budget. These capital gain improvements that will be constructed prior to the end of 2013 were all designed with the UDOT values in mind and fall in line within the goals as set out in your evaluation criteria, i.e. addressing mainline congestion, ramp queuing, and aging infrastructure. These improvements would all benefit the travelling public now, and reduce the risk of higher construction costs in the future to outfit aging, outdated infrastructure and would serve as a cornerstone in establishing and upholding the public trust wherein UDOT could use this approximate \$50-\$90 in other perhaps more needed infrastructure projects within the State. This work proposed by FSZ was not given the proper credit in the scoring system utilized by UDOT.

FSZ's scope provides improvements that directly benefit the traveling public by addressing the needed capacity improvements and exceeding the project goals by providing key features as described further below that will help address I-15 congestion beyond 2030, the 20 year planning horizon. In addition, FSZ's scope provides long term facilities that reduce the need for UDOT to enter the corridor and construct more facilities to meet future demand. For example, based on the current data, it would be expected that the University Parkway Interchange and Sandhill Intersection will be at capacity and completely congested within only 7 years of completion of the project.

The scope of the FSZ proposal both meets and exceeds UDOT's ITP criteria by providing more permanent improvements and leaving the public with a higher value of design. FSZ believes that it was not given proper and full credit in the scoring process for the work contemplated under the scope section of the FSZ proposal.

PROTEST ISSUES

The FSZ proposal does not require UDOT to go back into the freeway corridor to construct future public works and will save the public millions of dollars in funds. The benefits of

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the FSZ proposal are tied up in permanent scope as distinguished from temporary improvements offered by the PRC proposal.

FSZ contends that there is more than a 0.4 of a point differential between the FSZ and PRC scope proposals. FSZ requests UDOT to re-evaluate and give the proper and full weight to the scope section of the FSZ and PRC proposals. The following six features of the FSZ scope proposal are not all inclusive but are illustrative of the value, significance and benefit that its feels should be re-evaluated by UDOT.

Lehi Main Interchange:

FSZ's scope to completely reconstruct the existing Lehi Interchange provides additional value by:

- Constructing a new bridge with a span across Lehi Main sufficient to provide future widening. It is of significant value to meeting the future needs of the area.
- To accommodate adequate 2030 travel demands and LOS the interchange (including the intersections) the current width is not adequate. Lehi Main will require additional travel and turn lanes to meet 2030 intersection LOS operations (more width). The existing bridge span would not accommodate the needed future roadway width.
- In addition, the newly constructed bridge provides new design life, resulting in lower long term maintenance and avoids replacing the structure in the future. With current trends in construction costs, fully replacing the bridge at this time is a cost effective decision.
- The newly constructed bridge's structural life will begin upon project completion.

"2030 Main to Main" University Parkway

- This feature was FSZ's key proposal message. It is vital to provide improvements that will provide for the 20 year travel demands, without significant congestion, delays, increased travel times, or safety concerns. (This all can be related back to User Cost)
- FSZ's scope exceeds the CORE values, by improving the University Parkway interchange to meet 2030 travel demands and avoids replacing the existing bridge over I-15. FSZ's converts the existing Singlepoint Urban Interchange (SPUI) into a Diverging Diamond Interchange (DDI). The DDI optimizes the intersection operations improves the overall interchange operations to meet 2030 travel demands, exceeding the RFP requirement of 2020.

Sandhill Road & University Parkway Intersection:

- The Sandhill intersection is closely tied to the University Parkway interchange. This intersection is heavily congested, with significant traffic safety issues related to vehicles and pedestrian conflicts. FSZ's scope provides a new access to the Utah Valley University (UVU) campus, relieving a significant number of vehicles turning

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from University Parkway into the University at Sandhill. This significantly reduces the congestion at this intersection. In addition FSZ's scope provides a well illuminated pedestrian tunnel significantly improving safety by eliminating the vehicular and pedestrian conflicts across Sandhill Road.

- This interchange eliminates a full signal intersection, improves on safety and traffic flow.

TWO Express Lane Connections (Interchanges):

- FSZ's scope provides a new express lane connection at 400 North (access to and from the I-15 Freeway express lane). This is a benefit to both general motorist and transit uses. This new access point will reduce I-15 congestions and improve safety by reducing the number of motorists wanting to exit I-15 that have to weave across five lanes to exit the freeway. This also improves longevity of the adjacent interchanges by removing the number of trips through the interchanges. In addition, direct access from express lane facilities encourage motorists to use these dedicated lanes, because motorists do not have to mix with the general freeway traffic once in the lane. The results help promotes the use of HOV Expresslanes for cars and transit.
- FSZ's scope provides a new express lane connection at University Parkway (access to and from the I-15 Freeway express lane at 1500 South). This is a benefit to both general motorists and transit uses. In addition to the benefits discussed above FSZ's scope provides for a new park-and-ride facility with the land and improvements paid for by FSZ benefiting multimodal travel modes such as transit and ridesharing.
- The exits to the two ramps at the University and 400 No. interchanges promote safety and relieve mainline congestion.

Geneva Road - Alternate Route:

- FSZ's scope to improve Geneva Road to provide an alternate route for local Orem traffic during the construction of I-15, exceeds the project value, by providing final improvements of Geneva Road at the 400 South and UPRR/UTA crossing, including the construction of a new 7 lane bridge across the rail lines. The scope leaves behind improvements to Geneva Road consisting of a five lane roadway and improves intersections including traffic signals.
- This concept would increase user mobility and improve regional vehicular movement during the construction period.

Spanish Fork Interchange:

- FSZ's scope provides an interchange configuration that provides direct connection between I-15 and US 6 without the need for traffic signals.

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- Eliminating the need for traffic signals in this configuration will significantly improve safety and operations through this complex. In addition the interchange proposed in FSZ's scope provides additional capacity beyond 2030.

LEGAL ARGUMENT

As shown by the legal argument below, when an agency includes a requirement that responsible bidders "propose innovative and creative solutions for achieving the goals of the project" as one of the criteria, failure to properly score and evaluate the proposals pursuant to that criteria compels the setting aside of the award and a re-evaluation of the proposals. The case law cited below supports that kind of interpretation of Utah Code 63G-6-502(7)(b), (c).

In accordance with the ITP, section 4.8, award must be made to the proposal achieving the highest score on the technical elements. The technical elements, in turn, are to be evaluated based on the proposer's "ability to meet or exceed Project goals, values, and requirements." The underlying theme of the technical requirements reflects a desire for a design-build team with the ability to "implement as many improvements as possible" and to offer "creative, innovative solutions." Therefore, the appropriate evaluation and scoring of the technical elements must take into account the comparable improvements and "creative, innovative solutions" of the competing proposals.

The General Accountability Office's Comptroller General's (CGs) decisions provide guidance on the legality and propriety of the government's proposal evaluations. In the infamous Air Force tanker award protest filed by Boeing, for example, the CG sustained the protest because the source selection authority did not evaluate Boeing's proposal as satisfying significantly more requirements than the awardees'. *The Boeing Company, B-311344 et al.*, June 18, 2008. Similarly, UDOT must demonstrate that it evaluated the FSZ proposal as satisfying more requirements – as providing more improvements and innovative solutions – than the PRC proposal.

The CG in *Boeing* also stressed the government's obligation to evaluate advantages and disadvantages of competing proposals consistent with the RFP's evaluation scheme. *Id.* In this UDOT solicitation, an evaluation score reflecting a .4 difference in the highest evaluation factor is insufficient to capture the comparative advantages and disadvantages of the competing proposals.

Also consider the CG's decision in *Systems Research and Applications Corp.; Booz Allen Hamilton, Inc., B-299818 et al.*, Sept. 6, 2007. That solicitation, like this ITP, sought an innovative approach to fulfilling the objectives of the solicitation. The Air Force, however, rated the protester's technical approach as satisfactory, despite the fact that it offered superior innovations. The CG determined that the protester's innovations should have been considered

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in the Air Force's assessment of the merits of the proposals, and not simply checked off as a satisfactory fulfillment of a solicitation requirement.

Finally, consider the CG's decision sustaining a protest in *EPW Closure Services, LLC, B-294910 et al.*, Jan. 12, 2005: the solicitation provided that the Environmental Protection Agency was committed to achieving an accelerated closure of a nuclear reactor site, but the agency accorded little or no weight in its evaluation of proposals to the degree to which the offerors proposed to accelerate completion ahead of required site closure dates. Similarly, UDOT has failed to accord any or sufficient weight to FSZ's improvements and innovative solutions, despite the fact that those improvements and innovations were central to the ITP's technical requirements.

Looking at the manner in which UDOT "scored" the respective proposals, proper credit was not given to FSZ for the innovative and creative aspects of its proposal. While the benefit to UDOT and the public between the FSZ proposal and the PRC proposal is significant in the Scope area, the differential in points between the bidders is minimal. UDOT in its meeting with FSZ indicated that after FSZ hit the maximum score, UDOT could not give additional points for these innovative additional items, even stating "you filled the bucket and you can't go over." Such a statement directly contradicts the "meet and exceed" scoring criteria contained in the ITP. UDOT claims that it did not compare the proposals head to head, but only against the RFP. However, it is apparent that when evaluating the FSZ and the PRC proposal as to schedule, UDOT in fact did compare the proposals head to head. Such an inconsistent evaluation process is flawed and contrary to the law.

STIPEND

FSZ understands that FSZ will not be eligible to receive a stipend unless and until this protest is resolved. FSZ reserves all rights to refuse or accept the stipend provided for in Section 6.1 of the ITP. Until such time as this Notice of Protest receives a final determination, all information in the FSZ proposal shall remain under the ownership of FSZ as provided for in Section 7.1 of the ITP.

CONCLUSION

FSZ's scope provides significant improvements that directly benefit the traveling public by addressing the needed capacity improvements. The scope exceeds the project goals by providing key features as described above that will help address I-15 congestion beyond 2030, the 20 year planning horizon. In addition to this, FSZ's scope provides for permanent long term facilities that reduce the need for UDOT to re-enter the corridor and construct additional facilities to meet future demand. The scoring criteria implemented by UDOT in the awarding process is flawed in that it does not properly account or give credit for the improvements included in the scope section of the FSZ proposal. FSZ followed the directives of UDOT in the RFP by providing "creative, innovative solutions" to the issues UDOT was facing. However, it is

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apparent that credit was not given to FSZ for this work. Failure to give FSZ credit requires that UDOT set aside the apparent selection and re-evaluate the proposals consistent with the criteria in the RFP.

FSZ requests a meeting to meet and confer with UDOT concerning all matters arising under or related to this Notice of Protest in accordance with Section 8.1 of the ITP. Again, FSZ reserves the right to supplement this protest after it has had an opportunity to review additional information concerning the scoring and evaluation of all components of both the FSZ and PRC proposals.

All inquiries and correspondence in relation to this protest should be addressed to either Terry Poole, FSZ or Kent B. Scott, Babcock Scott & Babcock. Thank you for your consideration of this letter and your professional courtesy in the review of this protest.

Sincerely,
BABCOCK SCOTT & BABCOCK

A handwritten signature in black ink, appearing to read "Kent B. Scott", written in a cursive style.

Kent B. Scott

cc: Terry Poole, FSZ Joint Venture
Frank Rapoport, McKenna Long & Aldridge LLP
Dal Hawks, UDOT, dhawks@utah.gov and U.S. Mail